No. 443. 180

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Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Jan. 13, 1902.

A. C. FINNEY as Receiver, et al.,
Plaintiffs in Error,

v.

MARY A. GUY, &c.,
Defendant in Error.

Motion for Certiorari and other relief.
Petition for Certiorari and other relief.
Affidavit of A. J. Vinje, Circuit Judge.
Affidavit of Fred. W. Reed.
Brief in support of said motion.

W. E. HALE,
FRED. W. REED,
Of Counsel.

W. E. HALE,
FRED. W. REED,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1901.

No. 443.

A. C. FINNEY, as Receiver, et al.,
Plaintiffs in Error,

vs.

MARY A. GUY,
Defendant in Error.

NOTICE OF MOTION.

To R. M. Bashford, Esq., Counsel for Defendant in Error:

Please take notice, that on Monday, the 20th day of January, 1902, at the opening of said court, or as soon thereafter as counsel can be heard, plaintiffs in error will move said court for an order directing the issuance of a writ of certiorari, and for such other and further relief as is prayed for in the petition hereto attached.

That said motion will be made upon the said petition, on the files and records in said case, and on the certified copies of the briefs, and of Rule IX of the supreme court of the state of Wisconsin, and on the affidavit of A. J. Vinje, a copy of which is hereto attached marked Exhibit B, and of Fred W. Reed, a copy of which is hereto attached marked Exhibit C, which papers are now in the hands of the clerk of this court, and are referred to in said application.

W. E. HALE and
FRED W. REED,
Attorneys and Counsel for Petitioners and Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

A. C. FINNEY, as Receiver, AMERICAN SAVINGS AND LOAN ASSOCIATION, W. D. HALE, as Receiver of said AMERICAN SAVINGS AND LOAN ASSOCIATION, CHARLES WOLSFELD, C. G. MELQUIST, MRS. H. ADAMS, JOHN H. JORDAN, C. G. CARR, Agent, MRS. B. D. ADAMS, CASSIUS M. CONRAD, SAMUEL H. HALL, C. S. HULBERT as City Treasurer of the City of Minneapolis, ANDREW SUNDBERG, W. R. SINKS, DAVID HUSTON, C. A. MUNSON, KATE RANK, SAMUEL M. PRATT, STATE OF MINNESOTA, M. H. TOWNSEND, HARRISON PRATT, CHARLES G. VAN WERT, J. D. LADDY, MERCHANTS BANK OF WINONA, PEOPLE'S SAVINGS & LOAN ASSOCIATION, GUARANTY SAVINGS & LOAN ASSOCIATION, A. E. LECKIE, H. WEHMAN, and HARRISON PRATT and SAMUEL M. PRATT, Copartners as H. PRATT & CO.,

Plaintiffs in Error,

vs.

MARY A. GUY, and MARY A. GUY as Executrix and Sole Residuary Legatee under the Will of Charles V. Guy, Deceased.

Defendant in Error.

PETITION.

The petition of the plaintiffs in error in the above entitled cause respectfully shows to this honorable court as follows:

1. That the Farmers' and Merchants' State Bank, a corporation organized under the laws of the state of Minnesota, became insolvent on the 20th day of June, 1893, and on said day made an assignment in insolvency. That all the property of said bank was applied by the assignee to the payment of its debts, leaving a large deficiency. That an action was duly commenced and duly prosecuted to judgment in the proper court of the state of Minnesota, to enforce the liability of the stockholders within said jurisdiction toward the payment of said deficiency, and that after all had been collected from said stockholders that could be so collected and applied toward the payment of said deficiency, there was still a deficiency exceeding the sum of $100,000 duly owing your petitioners from said bank, all which facts were duly adjudged in said action. That at the time of the failure of said bank the defendant in error was a stockholder therein and was then, and ever since has been, a resident and citizen of the state of Wisconsin. That on or about the first day of May, 1899, an action was commenced ancillary to the proceedings had in the Minnesota court against the defendant in error as defendant in the circuit court of Pierce county, in the state of Wisconsin, by your petitioners as plaintiffs, to enforce her liability as such stockholder, toward the payment of said $100,000 deficiency still owing your petitioners as adjudged by said Minnesota court. To the complaint filed by your petitioners in said cause the defendant in error demurred on the ground that said complaint did not state facts sufficient to constitute a cause of action, and on the 30th day of June, 1899, said circuit court, by A. J. Vinje, a judge thereof, duly made its order overruling said demurrer. That on the argument of said demurrer, and in the brief filed with said judge before said order was made, your petitioners duly pre-

sented to and claimed in said court, substantially, that the action against the stockholders to enforce their liability to creditors of said bank, was a substantive right of action on contract, enforceable in any jurisdiction, and to refuse to enforce said cause of action in said court of Wisconsin would be contrary to the constitution and laws of the United States, in that it denies plaintiffs a right given them by Section 1, Article IV of the Constitution of the United States, and by Section 905 of the Revised Statutes of the United States, that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that said records and judicial proceedings shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

2. That on October 14, 1901, said A. J. Vinje, said judge who made said order, duly made his affidavit that your petitioners did duly so present substantially said claims on said hearing in their typewritten brief and orally, a copy of which affidavit is hereto attached marked Exhibit "B" and made a part hereof.

3. That during all the times herein mentioned, there has been in force and effect in the supreme court of the state of Wisconsin the following rules, to-wit:

RULE IX.

> "Rule IX of this Court is hereby amended so as to read (87 Wis.) as follows: Hereafter in calendar causes, each party shall prepare and print a brief; and each statement and proposition therein which is based upon the record *must*

refer to the page of the record as contained in the printed case upon which the same is based. The brief of the appellant or plaintiff in error must contain a concise statement (1) the nature of the action and the issues involved; (2) the result of the trial or hearing in the court below; (3) the several errors relied upon for reversal; (4) in cases depending upon the evidence, the leading facts or conclusions which the evidence establishes or tends to prove; (5) the principles of law applicable to the case, and the authorities in support of the same.

The brief of the respondent or defendant in error may point out any insufficiency or inaccuracy in the brief of the opposite party, and supply, correct and answer the same in the order indicated; and may also, in the cases indicated, state any leading facts or conclusions which the evidence establishes or tends to prove, and any principles of law applicable to the case, and the authorities in support of the same. No extended discussion upon a mere question of fact will be permissible in any brief or at the bar, but the brief must refer to the printed case where all evidence bearing upon such leading facts or conclusions may be found. No costs shall be taxed for the printing of any brief failing to comply with this rule or containing a miscitation of authorities not corrected before the submission of the cause."

RULE XVIII.

"Before the calling of a calendar cause, the plaintiff in error or appellant shall file with the clerk eight copies of the printed case, and each party eight copies of his printed brief. The clerk shall deliver one copy of each to each of the justices, to the reporter, and to the state librarian."

That under the law and practice of said supreme court of the state of Wisconsin, the only method of making, recording or presenting to said court assignments of error and the principles of law

applicable to the case, and the claims of parties founded thereon, is by printing the same in the briefs filed in accordance with said rules.

4. That the defendant in error duly appealed to the said supreme court of the state of Wisconsin from said order overruling said demurrer, and your petitioners, as respondents, duly filed in said supreme court, in accordance with said rules of said court, a printed brief, in which brief they duly made the same claims as above noted, that to refuse to entertain said cause of action would be contrary to the constitution and laws of the United States. That said supreme court reversed said order overruling said demurrer on the ground that the cause of action arising under the laws of Minnesota and the judgment of its courts would not be enforced in the courts of Wisconsin, and remanded said cause to said circuit court for further proceedings, in accordance with law.

5. That said demurrer was again brought on for hearing in accordance with said direction of said supreme court, in said circuit court on the 7th day of January, 1901, and that on such hearing the said demurrer was ordered sustained, and the said complaint ordered dismissed and that on March 27, 1901, judgment was entered in accordance with such order.

6. That your petitioners, as appellants, duly appealed from such judgment to said supreme court of the state of Wisconsin, and on such appeal duly filed their brief with said supreme court in accordance with said rules of said court, and in said brief made their assignments of error as follows, to-wit:

"ASSIGNMENTS OF ERROR.

The circuit court erred:

1. In sustaining the demurrer.

2. In ordering the action dismissed.

3. In ordering and entering judgment of dismissal.

4. In that it denied plaintiffs a right given them by Sec. 1, Art. 4 of the constitution of the United States, and by Sec. 905 of the revised statutes of the United States that full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state, and that said records and judicial proceedings shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken;" and devoted their entire said brief to the enforcement of said errors.

7. That said supreme court, on the 24th day of September, 1901, affirmed said judgment, and on said day a judgment of affirmance was duly entered in said supreme court.

8. That a writ of error to this court was duly allowed by said supreme court of the state of Wisconsin from such judgment on the 27th day of September, 1901.

9. That the clerk of said supreme court of Wisconsin made his return to said writ, but neglected and refused to make, as a part of said return, said briefs of your petitioners so filed in said court on said appeals, although requested so to do by your petitioners. And said cause was duly docketed in this court on October 25th, 1901, as Case No. 443 for October Term, 1901.

That the nature of the cause of action in said suit, the proceedings taken in said courts of Wisconsin, the questions passed upon by said supreme court of Wisconsin, the opinions of said supreme court on said appeals, and all the facts pertinent hereto, are more fully set out in said return which is now on file in this court and to which reference is hereby had, and made a part of this application.

10. That your petitioners duly requested said supreme court of Wisconsin to certify what your petitioners' assignments of error were in said briefs, and what claims were therein made concerning the federal right as hereinbefore set out; but that said court refused to so certify, either as to said assignments of error or as to said claims. That your petitioners duly requested said court to recite in their opinion handed down in affirming the judgment on the second appeal in this case what said claims and said assignments of error were, but said court refused so to do. That your petitioners duly requested the clerk of said court to certify to said assignments of error as a part of said return, but said clerk refused so to do. That your petitioners duly requested said clerk of said court, and said court to attach and make a part of the return to this court, said briefs of your petitioners duly filed in said appeals, but said clerk and said court neglected and refused so to do. That the attorney for the defendant in error refuses to consent that said briefs be made a part of the record in this court.

11. That Fred W. Reed, the attorney for your petitioners in all of said proceedings in said courts of Wisconsin, on October 16th, 1901, duly made an affidavit, a copy of which is hereto attached, marked exhibit "C" and made a part hereof, setting out the claims in said briefs concerning said Federal right as hereinbefore set out,

in the very words in which the same appeared in said briefs, and setting out also the assignments of error made in said brief on said second appeal in their exact words, in order to place in short form such claims and such assignments of error, for the reason that said briefs are very long, one of them being 91 pages in length, and the other 21 pages in length.

12. That in response to said writ of error the clerk of said supreme court of the state of Wisconsin transmitted to this court his return, but neglected and refused to include therewith said briefs, as a part thereof, but transmitted to this court with his return the following papers, to-wit:

(1) A certified copy of your petitioners' brief on the first appeal to said supreme court of the state of Wisconsin referred to above in paragraph 4 hereof.

(2) A certified copy of your petitioners' brief filed in said supreme court of the state of Wisconsin on the second appeal therein, containing your petitioners' assignments of error referred to above in paragraph 6 hereof.

(3) Said affidavit of said A. J. Vinje. (Exhibit B.)

(4) Said affidavit of said Fred W. Reed. (Exhibit C.)

(5) A certified copy of said Rule IX of said court referred to in paragraph 3 hereof.

That all of said papers are now in the hands of the clerk of this court, but that the clerk of this court declines to file said papers as a part of the record of said cause in this court; and reference is hereby had to all of said papers, and the same are made a part of this application.

13. Your petitioners respectfully submit that they are entitled to show to this court what federal rights were presented and claimed in said supreme court of Wisconsin and how it was done; and that the briefs so filed by your petitioners are a part of the record in said cause, and should be attached and made a part thereof; and that unless the relief herein prayed for is granted, your petitioners fear lest they be wholly powerless to show to this court what claim your petitioners made in said supreme court of the state of Wisconsin concerning said federal right hereinbefore set out.

That if said affidavit of Fred W. Reed is allowed to become a part of the record it can be printed in lieu of said briefs and save unnecessary cost and prevent an unnecessarily bulky record. That the only way to show what claim was made by your petitioners in said circuit court on the first hearing on said demurrer is by said affidavit of said A. J. Vinje, the judge before whom said hearing was had.

Wherefore, your petitioners respectfully pray that said return be remanded to said supreme court of the state of Wisconsin, and that a writ of certiorari be issued out of, and under the seal of this court, directed to said supreme court of the state of Wisconsin commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court in said case, including said briefs of your petitioners, or at least the assignments of error on said second appeal; or that this court make an order directing that said certified copies of said briefs now in the hands of the clerk of this court, and said certified copy of said Rule IX, and said affidavits of said A. J. Vinje and Fred W. Reed, be filed in this court

as a part of the record of said cause in this court; or that your petitioners may have such part of said relief, or such other and further relief or remedy in the premises as to this court may seem appropriate. And this your petitioners will ever pray.

A. C. Finney, as Receiver, American Savings and Loan Association, W. D. Hale, as Receiver of said American Savings and Loan Association, Charles Wolsfeld, C. G. Melquist, Mrs. H. Adams, John H. Jordan, C. G. Carr, Agent, Mrs. B. D. Adams, Cassius M. Conrad, Samuel H. Hall, C. S. Hulbert as City Treasurer of the City of Minneapolis, Andrew Sundberg, W. R. Sinks, David Huston, C. A. Munson, Kate Rank, Samuel M. Pratt, State of Minnesota, M. H. Townsend, Harrison Pratt, Charles G. Van Wert, J. D. Laddy, Merchants Bank of Winona, Peoples Savings & Loan Association, Guaranty Savings & Loan Association, A. E. Leckie, H. Wehman and Harrison Pratt and Samuel M. Pratt, copartners as H. Pratt & Co.,

Petitioners.

By FRED W. REED,

Attorney and Counsel for Petitioners.

W. E. HALE and FRED. W. REED,

Of Counsel for Petitioners.

State of Minnesota, County of Hennepin—ss.

Fred W. Reed being duly sworn, says that he is one of the attorneys and of counsel for the petitioners above named, and as such has had personal charge for said petitioners of the cause in the foregoing petition mentioned in all of the courts of the state of Wis-

consin; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

FRED W. REED.

Subscribed and sworn to before me this 23rd day of December, 1901.

THOMAS F. WALLACE, JR.,

(Notarial Seal.) Notary Public,

Hennepin County, Minn.

EXHIBIT "B."

(TITLE OF CAUSE.)

AFFIDAVIT OF A. J. VINJE.

State of Wisconsin, County of Chippewa—ss.

A. J. Vinje being first duly sworn, deposes and says, that he is now, and for more than three years last past has been, a judge of the circuit court of the state of Wisconsin; that as such judge he made the order, dated June 30th, 1899, overruling the demurrer to the complaint in the above entitled cause; that on the hearing on said demurrer, in his oral argument and in his typewritten brief submitted to me as such judge before said order was made, Fred W. Reed, the attorney for the plaintiffs, duly presented to the court and duly claimed that the statutory liability of stockholders to creditors is a substantive right of action arising on contract enforceable in any jurisdiction, and that to refuse to enforce in the courts of the state of Wisconsin, the cause of action set out in plaintiffs' complaint, would be contrary to the constitution and laws of the United

States, in that it would be a refusal to give due faith and credit to the proceedings of the courts of the state of Minnesota.

A. J. VINJE.

Sworn to and subscribed before me this 14th day of October, 1901.

C. E. PRESTON,
Clerk of Circuit Court.

(Seal Circuit Court, Chippewa County.)

EXHIBIT "C."

(TITLE OF CAUSE.)

AFFIDAVIT OF FRED W. REED.

State of Minnesota, County of Hennepin—ss.

Fred W. Reed being first duly sworn, deposes and says, that he is one of the attorneys for the plaintiffs in the above entitled cause, and the attorney who has attended to the actual prosecution of said cause; that on the hearing in said cause in the circuit court in and for Pierce county, Wisconsin, on the demurrer, after which hearing said demurrer was overruled by order dated June 30th, 1899, affiant presented to said court, before said order was filed, in his typewritten brief substantially the same claims as were thereafter presented to the supreme court of the state of Wisconsin in respondents' brief filed by him in said supreme court as hereinbelow recited; that in accordance with the rules of said supreme court, on the first appeal in said cause affiant, on the 1st day of March, 1900, duly filed in said court his printed brief, a true and correct copy of which

brief, duly certified by the clerk of said court under the seal of said court, is on file in the records of this court; that in said brief plaintiffs by their said attorneys, duly claimed as follows (pg. 36):

"The question before this court is in short this: Will this court refuse to enforce the solemn contract of this defendant, entered into under the laws of Minnesota, simply because she is a resident of the state of Wisconsin, the laws, their interpretation and the methods of enforcement of the two states, being practically identical? A question whether an unquestioned liability shall be enforced outside of the parent forum after all has been done there that can be done. * * *

To decline to maintain this action is to refuse to enforce a contract because made in another state, and is a simple refusal of justice; it is to declare that an unquestionable right shall go without a remedy."

And under this general proposition plaintiffs, in said brief, duly presented the following claims and the authorities to support same in words and figures as follows, (pg. 36-51):

"A cause of action arising on contract is a substantive right enforceable everywhere:

Walker vs. Whitehead, 83 U. S. 314, 317.
Roberts vs. Cocke, 38 Gratt. 207.

1. The statutory liability of stockholders to creditors is a substantive right of action arising on contract.

Bagley vs. Tyler, 43 Mo. App. 195-202.
Dennis vs. Court, 91 Cal. 548.
Hodgson vs. Cheever, 8 Mo. App. 315-321.

Guerney vs. Moore, 131 Mo. 650-672.

Tinker vs. Van Dyke, 1 Flip. (U. S.) 521.

Hobart vs. Johnson, 19 Blatch. 359.

Flash vs. Conn., 109 U. S. 371.

Western Natl. Bank vs. Lawrence, 76 N. W. 105.

Bank vs. Ellis, 172 Mass. 39.

First Natl. Bank vs. Gustin, 42 Minn. 327.

Henecke vs. Twomey, 58 Minn. 550.

Hanson vs. Davison, 73 Minn. 454.

Coleman vs. White, 14 Wis. 762.

Gianella vs. Bigelow, 96 Wis. 185.

Williams vs. Meloy, 97 Wis. 561.

III Thompson on Corporations, Sec. 3059.

A right of action arising on a statute is just as enforcable in any other state as a right of action under a common law.

Dennick vs. R. R. Co., 103 U. S. 11.

Bigelow vs. Nickerson, 70 Fed. 114.

Greaves vs. Neal, 57 Fed., p. 816.

The principle applied in these cases applies with equal force to the statutes enacting liability of stockholders.

Bell vs. Farwell, 176 Ill. 489.

Western Natl. Bank vs. Reckless, 96 Fed. 70.

Lowry vs. Inman, 46 N. Y. 119.

This action then is really one to enforce a valid contract as much so as if it were a promissory note made in the state of Minnesota; and to refuse to entertain this action is a refusal to enforce a contract simply because it was made in another state, and to refuse to recognize the validity of a solemn and just contract."

And also the further claims in said brief (pgs. 64-81) to-wit:

"This action is ancillary to the decree entered in the Minnesota court. The proceedings there had are binding on the stockholders everywhere, and to refuse to maintain this action is to refuse to give due faith and credit to the judgment of a sister state.

1. This is an ancillary action.

As twice before suggested in this brief, the question here arising is quite other than the one usually in such cases, in that this case is ancillary to exhaustive proceedings in the home jurisdiction. The considerations here presented are such that a court might readily maintain this action where it had before declined to maintain an original action (p. 64, citing various cases).

2. The judgment in the Minnesota court is binding here.

Harmon vs. Hunt, 21 S. E. R. 559 (N. C.).
Baltimore & Ohio R. R. vs. Smith, 54 O. St. 562.
Guerney vs. Moore, 131 Mo. 650.
Merchants Bank vs. Chandler, 19 Wis. 457.
Powell vs. Oregonian Ry. Co., 38 Fed. 187.
Stevens vs. Fox, 83 N. Y. 313.
Alexander vs. Donohoe, 143 N. Y., p. 203.
Howard vs. Glenn, 85 Ga. 238.
Great Western Tel. Co. vs. Gray, 122 Ill. 630.
Bates vs. Telegraph Co., 134 Ill. 536.
Hawkins vs. Glenn, 131 U. S. 319.
Glenn vs. Liggett, 135 U. S. 533.
Nickels vs. Stevens, 123 Mo., p. 96.
Holland vs. Development Co., 65 Minn. 324.

Hanson vs. Davison, 73 Minn. 454.
Hale vs. Hardon, 95 Fed. 747.

5. (Pg. 79) Not to enforce plaintiffs' judgment is to refuse to give due faith and credit to the judgment of a sister state.

In Huntington vs. Attrill, 146 U. S. 657, the facts are, a judgment was recovered in the state of New York under the statutes of New York against the defendant in 1863 for his liability as a stockholder and officer in a certain corporation. An action was brought in the state of Maryland to enforce the New York judgment. The court of appeals of Maryland sustained the demurrer to the bill on the ground that the judgment obtained in New York was in the nature of a penalty. A writ of error was issued out of the U. S. supreme court, and that court, in an elaborate and exhaustive opinion, holds that the refusal of the Maryland court to enforce said judgment was contrary to the constitution in that it did not give due faith and credit to the judgment rendered in the New York court. The court said (p. 80):

> "Nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on and pleaded or offered in evidence. (Macelmoyle vs. Cohen, 13 Pet. 312-325.) But when duly pleaded and proved in a court of that state, they have the effect of being not merely prima facie evidence, but conclusive proof of the rights thereby adjudicated; and refusal to give them the force and effect, in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States."

In the case of Pelzer Mfg. Co. vs. Fire Ins. Co., 71 Fed. 826, which is an action to enforce a judgment of the state court, the court said, after reciting the necessary prerequisites (page 834),

> "But when all these are established, this judgment, when duly pleaded and proved in a court of the United States, sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it the force and effect, in this respect, which it has in the state in which it was rendered, denies to the judgment creditor a right secured to him by the constitution and laws of the United States."

In the Central Trust Co. vs. Railroad Co., 65 Fed. 257, which was an action in the federal court upon a judgment of the South Carolina court recovered in a cause of action originating in Georgia, the court said (page 262),

> "Whenever, by either the common law or the statute law of the state, a right of action has become fixed and legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. * * * They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in the state in which it was rendered, denies to the judgment creditor a right secured to him by the constitution and laws of the United States. (Citing Huntington vs. Attrill, 146 U. S. 686)." "

That on the second appeal in said cause to the said supreme court of the state of Wisconsin, the plaintiffs (who were appellants

on said second appeal), in accordance with Rule IX of said supreme court (a duly authenticated copy of which rule is on file with the clerk of the court in this cause), did on the 3rd day of September, 1901, duly file in said court their brief, which brief included their assignments of error and their points and authorities relied upon in the support thereof, a duly authenticated copy of which brief is on file in this cause with the clerk of this court. That in the said brief these plaintiffs, as appellants, duly made their assignments of error as follows (pages 3-4), to-wit:

"ASSIGNMENTS OF ERROR.

The circuit court erred:

1. In sustaining the demurrer.

2. In ordering the action dismissed.

3. In ordering and entering judgment of dismissal.

4. In that it denied plaintiffs a right given them by Sec. 1, Art. 4 of the constitution of the United States, and by Sec. 905 of the revised statutes of the United States that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that said records and judicial proceedings shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

That the entire brief of appellants on said second appeal is devoted to the enforcement in said supreme court of the above 4th assignment of error; and that among other cases cited in support of said proposition are

Hancock Natl. Bank vs. Farnham, 176 U. S. 640, and

Whitman vs. Bank, 176 U. S. 559.

And in enforcing which ~~argument~~ assignment, appellants made the following propositions; all of which were duly supported by citations of authorities as therein appears, to-wit:

"The liability here sought to be enforced is, though statutory in its origin, contractual in its nature." (Pg. 6.)

"There is no essential difference between this liability and the liability for unpaid assessments on stock." (Pg. 7.)

"The proceedings in the Minnesota court are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation." (Pg. 7.)

"The construction of the Minnesota statute by the Minnesota court is binding on all other courts." (Pg. 7.)

"The right to enforce this liability is not a mere matter of comity, but is a right under the general principle of jurisprudence to enforce a contract." (Pg. 8.)

And says (p. 8):

> "If I understand these decisions rightly they hold that if the liability is contractual the cause of action is transitory, that whether or not it is contractual and therefore transitory depends on the construction of the laws by the court of last resort in the home state of the corporation; if such court has construed such laws so as to give a contractual liability such right of action on contract can be enforced anywhere, whether it be done under the general principles of jurisprudence or be regarded as a matter of comity, and where the action in the foreign forum is an ancillary action in aid of the proceedings already had in the home forum, a refusal to entertain such suit by the foreign court is contrary to the constitution and laws of the United States, which require that the *same* faith and credit must be given these proceedings in other states to which they are entitled in the state in which they were had."

And concludes as follows (pg. 19):

> "Now this court said (syllabus) in Eau Claire Natl. Bank vs. Benson, 106 Wis. 624: 'The constitutional or

statutory liability of stockholders of a corporation to its creditors, created by the laws of the state of Minnesota, must be held to be of the same nature here as by the highest court of such state,'and that that court having determined the nature of such liability 'this court is bound thereby.' And in Finney vs. Guy this court refuses to enforce the Minnesota law because (p. 625) '(1) The statutory right, coupled with the statutory remedy for its enforcement clearly intended to be pursued at the home of the corporation, is not transitory. (2) The action in a Minnesota court is a bar to any other action to enforce the liability of stockholders,' but this court admits (p. 271) that under Hanson vs. Davison the right of action is (p. 271, (1) Contractual and transitory, (2) Does not provide a special remedy enforceable only in the original action, (3) Is not barred as to stockholders not brought into the original action. Then under the admissions in the decision itself Finney vs. Guy is contrary to the federal constitution and laws, on the authority of Hancock Bank vs. Farnum and Whitman vs. Bank for it specifically refuses (p. 275) 'to give effect to the Minnesota law as now construed by its highest tribunal,' and says for reasons named (p. 276) 'The law of Minnesota, as now understood, should not be made effective here.'"

FRED W. REED.

Subscribed and sworn to before me this 16th day of October, 1901.

HOWE PAIGE,
Notary Public,
Hennepin County, Minn.

(Notarial Seal.)

BRIEF.

This brief presents the following propositions:

1. Plaintiffs in error claim the opinions filed in this cause by the supreme court of Wisconsin are by the statutes of Wisconsin a part of the record.

2. That an examination of those opinions shows that in deciding this case the federal question was *necessarily* involved and the federal right here claimed was necessarily passed upon and denied.

3. But the plaintiffs in error have the right to show to this court just what was "*claimed and presented*" to the Wisconsin supreme court, that under the rules and practice of that court the only way of presenting their assignments of error to that court was in their briefs, and under the facts of this case the proper, if not the only, method of presenting and claiming the federal right relied on was in said briefs required by the rules of that court to be filed in said court, that therefore such briefs are a part of the record and should have been returned as such.

4. That the ordinary method of completing the return is to remand with writ of certiorari to have such return completed; but

5. This court has power to amend the record here, since these briefs are before this court in the hands of its clerk and duly certified to by the clerk of the supreme court of Wisconsin, the amend-

ment requested has become a merely formal one and this court should direct that said briefs be filed and stand as a part of the record without remanding and without a writ of certiorari.

6. This court has always claimed and exercised the right to determine for itself what shall be admitted into the record in this court as tending to show what federal rights were claimed in the state courts and how it was done. In doing so this court will go outside the return or record proper in the state court. Under these propositions there should be admitted to this record:

(a). The two briefs, whether or not they are technically a part of the record in the state court.

(b). The affidavit of A. J. Vinje, the judge of the circuit court who overruled the demurrer, as the *only* method of showing what was claimed at that time.

(c). The certified copy of Rule IX as showing how assignments of error and claims of legal rights are to be presented to the supreme court of Wisconsin.

(d). A copy of Rule XVIII requiring such briefs to be filed with the clerk of that court.

(e). The affidavit of Fred W. Reed which simply places in short form for printing, the exact words in which the Federal right was claiming in said briefs, and states in exact words the assignments of error, while the briefs themselves are long; the first one being very long and discussing other questions, as well.

I.

The opinions of the Wisconsin Supreme Court are a part of the record.

The statutes of Wisconsin provide (Stat. 1898, Sec. 2410):

> "The supreme court shall give their decisions in all cases in writing, which shall be filed with the other papers in the case; and such decisions and all decisions and opinions delivered by the court or any justice thereof in relation to any action or proceeding pending in said court, shall remain in the office of the clerk. Every written opinion or decision of the supreme court which shall have been filed with the clerk, shall constitute and be held a part of the record in the action or proceeding in which it shall have been given and filed and shall be certified therewith to any court of the United States to which such action or proceeding or the record thereof may be in any manner certified or removed."

This court will therefore look into the three opinions returned here in this record, to-wit: 1. Opinion of Judge Marshall on the first appeal (reported in 106 Wis. 256). 2. Dissenting opinion of Judge Dodge on the first appeal (reported in 106 Wis. 277). 3. Opinion of Judge Dodge on second appeal (reported in 87 N. W. Rep. 255, current Nos. of Oct. 12 and 19); for all of these have by this statute become an actual part of the record for the determining of what federal question was involved or passed upon.

Gross vs. United States Moregage Co., 108 U. S. 477.

II.

The decision of the Wisconsin court necessarily denied the Federal right.

The complaint set out in the return alleges that under the laws and decisions of Minnesota, the right of action sued on is such.

1. That the liability of the stockholder is several and not joint.

2. That the action in the home jurisdiction is not the exclusive remedy, but that the liability of any omitted stockholder can be enforced by an action ancillary to such proceedings in any jurisdiction where he can be served with process.

3. That the cause of action is contractual and the action to enforce the liability is an action on contract.

4. That the proceedings had in the home jurisdiction are binding on the stockholder, whether a party or not, in that he is represented by the corporation and the judgment is in effect a judgment against him in his corporate capacity.

5. That the laws of the state of Minnesota are a part of the contract of the stockholder by virtue of his subscription to stock.

6. That his liability is primary and principal and not that of a surety of the corporation.

The supreme court of Wisconsin admits this to be the state of the Minnesota law, but says (see return, also 106 Wis., on page 275), that the decision of the Minnesota court in Hanson vs. Davison, "is so out of harmony with the previously established doctrine of the Minnesota court, and with elementary principles, and so subversive of the rights of parties equally interested in a controversy to an equality of remedies, and of the right of every person to his day in court as to every material question involving his interest that there is no rule of comity which requires or justifies its recognition in any other jurisdiction"; and again, (pg. 276): "For these and many other reasons that might be named, the law of Minnesota as at present understood should not be made effective here"; and

concludes (pg. 277) "that the complaint fails to state a cause of action *that can be entertained by the courts of this state* and that the decision of the lower court to the contrary must be reversed and the cause remanded for further proceedings according to law."

Judge Dodge begins his dissenting opinion (pg. 277) thus:

"The decision in this case seems to me to destroy a clear and absolute right by denying any remedy for its enforcement."

This court says that such a decision denies the federal rights secured by Sec 1, Art. IV, of the constitution of the United States and by section 905 of the revised statutes of the United States.

Hancock National Bank vs. Farnum, 176 U. S. 640.

And that on such a state of facts this court had jurisdiction because the Federal question was necessariiy involved.

Telegraph Co. vs. Purdy, 162 U. S. 329-334,

and this seems to be assumed also in

Lloyd vs. Matthews, 155 U. S. 222.

And in many other cases this court has held generally that if the decision of the state court necessarily involved the federal question or denied the federal right, this court has jurisdiction. This was the specific ruling in

Kaukauna Co. vs. Green Bay, 142 U. S. 254,

and the same attitude of this court is presented in

Furman vs. Nichol, 75 U. S. 44.

Chicago Life Ins. Co. vs. Needles, 113 U. S. 574.

Murray vs. Charleston, 96 U. S. 432.

Arrosmith vs. Harmoning, 118 U. S. 194.

Des Moines Nav. Co. vs Iowa Homestead Co., 123 U. S. 552.

Eureka Lake Co. vs. Yuba County, 116 U. S. 410.
Spencer vs. Merchant, 125 U. S. 345.
C. B. & Q. Ry. vs. Chicago, 166 U. S. 226.
O'Neill vs. Vermont, 144 U. S. 348.
Roby vs. Colehour, 146 U. S. 153.

III.

Though the Federal question is necessarily involved in the decision, still plaintiffs have the right to show this court that they duly claimed the Federal right, and that too in the only manner feasible, under the facts.

Plaintiffs prsented in their complaint a cause of action of such a nature that to refuse to entertain it in the courts of Wisconsin, would be contrary to Sec. 1, Art. IV, of the constitution of the U. S. and section 905 of the revised statutes of the U. S.. The naked refusal to entertain this cause of action is itself a violation of the rights here secured.

Now, as a physical fact, plaintiffs might have gone on and alleged in their complaint that if the court of Wisconsin refused to entertain this cause of action, they would violate this provision of the constitution and laws, but certainly such allegation in the complaint would not be proper pleading and the state court would undoubtedly have stricken it out on motion. At any rate plaintiffs had no right to assume in the first instance that the courts of Wisconsin would refuse to entertain the action, and thus violate these Federal rights.

When the cause came first before the circuit court of Wisconsin, the circuit court. of Wisconsin the circuit judge, A. J. Vinje, rec-

ognized these rights and overruled the demurrer, as is shown by his affidavit herein (exhibit B). The defendant appealed to the supreme court of Wisconsin, and the *only* method by which plaintiffs could then "claim or present" the Federal right to the supreme court of Wisconsin was in their brief. This they did. The supreme court renders an opinion which on its face violates these Federal rights, and sends the case back to the circuit court for further proceedings. The demurrer is then brought up again for hearing, and the circuit court sustains the demurrer and dismisses the complaint. Judgment is entered thereon, and from such judgment plaintiffs appeal, alleging as error that the decision was in violation of these Federal rights, and devoted their entire brief on that second appeal to the enforcement of such error.

Under Rules IX and XVIII of the supreme court of Wisconsin, (set out on pages 4 and 5 of the petition herein), the only way to present to the supreme court of Wisconsin the assignments of error and the Federal rights claimed in support of the same, was in said brief. That court has decided that no assignment of error will be considered in that court except such as are inserted in such brief.

Weyerhaeuser vs. Earley, 99 Wis. 445.

Grimm vs. The Town of Washburn, 100 Wis. 229.

That court also decided in *Butler vs. State*, 102 *Wis.* 364, that even when such assignments of error are presented, they will not be considered by that court unless argued.

Under such practice then these briefs became a part of the record in the supreme court of Wisconsin, and these plaintiffs have a right to present in some legitimate way to this court, the assignments of error and the federal rights claimed in such briefs. It is true

that the supreme court of Wisconsin might have shown the naked facts as to what these claims and assignments of error were by any one of four distinct methods:

1. By a certificate of the chief justice reciting, not the federal question in legal terms, but the actual assignments of error and claims as to federal right set out in the briefs in *haec verba*.

2. By directing the clerk to so certify.

3. By reciting same in the statement of facts in the opinion handed down on the final appeal.

4. By directing the clerk to certify up the briefs as a part of the return.

All of these methods was duly requested by the plaintiffs as appears in the 10th paragraph of their petition, but that court refused to certify in any manner. Whether or not such assignments of error and claims of federal right were sufficient to raise a federal question and give this court jurisdiction is for this court to say, but these plaintiffs earnestly insist they have a right to show this court in some way what *claims* they made and *how* they made them, and to leave to this court their sufficiency.

That this court will examine such briefs to determine the federal question presented in the state court, if in some way brought here, seems determined by Des Moines Nav. Co. vs. Iowa Homestead Co., 123 U. S. 552-554. Petitioners claim that the mere statement of the facts demonstrates their right to have these briefs placed before this court in some legitimate manner, for the purpose of determining the jurisdictional question.

If these briefs are technically a part of the record below, then certiorari is proper, if necessary.

A motion for certiorari is the ordinary method of completing the record (U. S. Sup. Ct., Rule XIV), if the return from the court below is defective, and is readily granted when applied for in season.

United States vs. Gomez, 1 Wall. 690-702.
M. K. & T. R. R. Co. vs. Dinsmore, 108 U. S. 30.
Elmore vs. Grymes, 1 Pet. 468-472.
The Rio Grande, 19 Wall. 178-188.
Field vs. Milton, 3 Cranch 514.

And this court has frequently, on a motion for certiorari, granted other relief that seemed more appropriate, although not prayed for.

In United States vs. Adams, 73 U. S., 101, 112, on motion for certiorari, the motion was overruled, but the record was remanded with directions to make new findings of fact.

In United States vs. Adams, 76 U. S., 661, on motion for certiorari the court said that the appellants were entitled to relief, but it did not regard certiorari proper and ordered what it considered a more appropriate remedy—that the record be remanded with instructions to find and certify additional matters of fact.

And in Hodges vs. Vaughan, 86 U. S., 12, on motion for certiorari, the motion was denied, but in place thereof leave was granted to the plaintiff in error to withdraw the transcript in order to enable the clerk of the court below to append the necesssary certificate.

In Woodward vs. Brown, 13 Pet., 1, the writ was denied and the amendment allowed in this court.

In Railroad Company vs. Schutte, 100 U. S., 644, on motion to dismiss the appeal for deficient record, appellant was allowed in-

stead thereof to defeat the motion by filing in this court before a certain date, certified copies of the missing papers.

V.

This court has power to amend, and since to allow these briefs to stand as a part of the record is, under the facts, in effect a formal amendment, it should be made here.

The two briefs which it is sought to make a part of the record are in the hands of the clerk of this court, each one duly certified to by the clerk of the supreme court of Wisconsin, and show they were duly filed in that court; but because they were not returned attached a part of the return, they are not considered a part of the record here. All that is needed is for this court to direct that they be filed here as a part of the record.

In Anon., 1 Gall., 22 Justice Story discusses the ability of the federal courts under the statutes to amend the record, and concludes (p. 23): "There is, then, in the nature of an appellate jurisdiction, nothing which forbids the granting of amendments."

In Woodward vs. Brown, 13 Pet., 1, on motion for certiorari because the clerk below had made an error in not entering the judgment according to the declaration, the motion was denied and the amendment was allowed here.

In Kennedy vs. Bank, 8 How., 586, the case was dismissed for want of jurisdiction, and afterwards was reinstated and the record amended. The court said (p. 610):

> "There is nothing in the nature of an appellate jurisdiction proceeding according to the common law, which forbids the granting of amendments, and the 32nd section of the Ju-

ridiciary Act of 1789 allowing amendments is sufficiently comprehensive to embrace both the appellate as well as original jurisdiction. 1 Gall., 22. But it has been the practice of this court, where amendments were necessary, to remand the cause to the circuit court for that purpose. The only exception to this rule has been where the counsel on both sides have agreed to the amendment. This has been often done, and it has not been supposed that there was any want of power in the court to permit it. The objection is that consent cannot give jurisdiction; this is admitted; but the objection has no application to the case. Over the subject matter of the suit and of the parties the court had jurisdiction, and the amendment corrected an inadvertence by stating the fact of citizenship truly."

This case is cited and relied upon as showing power in the appellate court to amend the record, in the following cases:

Warren vs. Moodey, 9 Fed. 673.

U. S. vs. Hopewell, 51 Fed., 800.

In re Brockway Co., 87 Me., 483.

In Udall vs. Steamship, 17 How., 17, the court said (p. 18):

"It has not been the practice of this court to allow amendments except by the consent of parties; though in the case of Kennedy et al. vs. Georgia State Bank, 8 How., 610, this court says, 'There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc.,' but the practice has been to remand the cause to the lower court for amendment."

In Hudgins vs. Kemp, 18 How., 530, the court said that amendment here might be made by consent, and refers to Woodward vs. Brown, supra, as a case of a correction of a mere clerical error, and says (p. 534):

> "But in the case before us there is no consent to amend, and the errors alleged are of a very different character from the mere formal error in the case of Woodward vs. Brown. And if it were otherwise, still, there should have been a motion to amend by inserting in the transcript the certificate above mentioned of the clerk before the motion was made to dismiss. But no such motion has been made, and the transcript now before the court is the one originally certified, without any amendment here by consent or by order of the court."

Which language would seem to recognize that to move to amend here is proper in the proper case.

In Gates vs. Goodloe, 101 U. S., 612, on a motion to dismiss, instead of dismissing, the court granted an application of the assignee in bankruptcy to be substituted as the plaintiff in error.

In Bowden vs. Johnson, 107 U. S., 251, on page 264, as a counter motion to a motion to dismiss, a new receiver moved to amend the record by substituting his name as plaintiff in error here, which motion was granted on the authority of Gates vs. Goodloe, supra.

In Sitt vs. Huidekopher, 131 U. S. (appendix), cxviii, there was a motion for certiorari, which motion was denied; but this court allowed the amendment of the transcript to show the entry of judgment in the court below on the authority of Woodward vs. Brown, supra.

The foregoing cases would seem to show conclusively that it is within the *power* of this court to direct that these briefs stand as a part of the return, and under the facts it does not seem to these plaintiffs that it would be a violation of the spirit of the *practice* in such cases to so direct.

VI.

This court determines for itself what shall constitute the record in this court, for the purpose of determining its jurisdiction.

What has been said above is on the assumption that these briefs should have been made a part of the return of the court below. But if these plaintiffs understand the decisions and practice of this court, this court does not confine itself to the technical return from the court below as the basis of determining whether or not this court has jurisdiction. To determine this question it will go outside of the return from the court below, so that even if this court should hold that these briefs were not technically a part of the record in the court below, and need not therefore have been made a part of the return, still this court will look into such papers as may aid it in this regard—for instance, the affidavit of the circuit judge—if properly brought before it. This motion, therefore, to have these briefs and this affidavit stand as part of the record in this case for the purpose of determining jurisdiction, would seem to be proper.

For this court has always claimed, and exercised, the right to determine for itself what shall be admitted into the record in this court as tending to show what federal rights were claimed in the state courts, and how it was done. In Murdoch vs. Memphis, 20 Wall., 590, Judge Miller said (p. 633):

> "It is probable that in determining whether one of those questions was actually raised and decided in the state court, this court has been inclined to restrict its inquiry too much by this express limitation of the inquiry 'to the face of the record'; what was the record of a case was pretty well understood as a common law phrase at the time that statute was

enacted; but the statutes of the states and new modes of proceedings in those courts have changed and confused the matter very much since that time."

And goes on to say that because of these changes it has become necessary to take new methods of determining what was decided, enumerating among other things the opinion of the state court and the certificate of its chief justice and in the same opinion (p. 615) Judge Miller further says:

> "To this has been added the further suggestion that in determining whether the question on which the jurisdiction of this court depends, has been raised in any given case, *we are not limited to the record which comes to us from the state court—the record proper of the case as understood at common law—but we may resort to any such method of ascertaining what was really done in the state court as this court may think proper, even to ex parte affidavits.*"

This court has always held that when anything has transpired by reason of which jurisdiction in this court is terminated, such matter should be brought before it by evidence outside of the record proper.

Lord vs. Veazie, 8 How., 250.

California vs. San Pablo, etc., Ry. Co., 149 U. S., 308-314.

Mills vs. Green, 159 U. S., 651, 653.

Little vs. Bowers, 134 U. S., 547.

Allen vs. Georgia, 166 U. S., 138.

And after the analogy of these cases, this court seems to hold in other cases that such evidence outside of the record proper will be admitted in any case where the admission of such evidence might determine the action of this court.

In Dakota County vs. Glidden, 113 U. S., 222, the syllabus is:

> "Evidence of facts outside of the record, and affecting the proceeding of the court in a case on error or appeal, will be received and considered, when deemed necessary by the court for the purpose of determining its action," the court said, (page 225) "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal."

In Elwell vs. Fosdick, 134 U. S., 500, this court (p. 513) cites and approves the above language from Dakota County vs. Glidden.

In Kimball vs. Kimball, 174 U. S., 158, this court uses this language (p. 162):

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence (citing Dakota County vs. Glidden and Mills vs. Green, supra). The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to federal questions only, as to a writ of error to a circuit court of the United States, on which the jurisdiction of this court extends to the whole case. The rule was applied to a writ of error to the court of errors and appeals of the state of New Jersey in Little vs. Bowers, 134 U. S., 547."

In determining this jurisdictional question, this court in Des Moines Navigation, etc., Co. vs. Iowa Homestead Co., 123 U. S., 552, actually examined the records and briefs in other cases and the briefs, in the case at bar, used in the court below. This is recited in the syllabus, which is as follows:

> "The supreme court of the state of Iowa, in deciding this cause, held, and so stated in its opinion, that the question of prior adjudication of the issue by this court in Homestead Valley vs. Railway Co., 17 Wall. 153, was not raised before it by counsel for defendant, and therefore was not in the case; and it decided the case without considering that point. On examining the opinion of that court, and the record and briefs, and the briefs in the court below in this case and in the case of Litchfield vs. Goodnow, ante, 549, this court is of opinion that the point was raised and discussed in the supreme court of Iowa, and holds that the action of that court in respect to it was equivalent to a denial of the federal right so set out."

Under the practice of this court, therefore, as understood by your petitioners, in order to determine clearly the question of jurisdiction, this court will admit in some way into the record before it for its examination—

(a) These two briefs filed by plaintiffs on the several appeals in the court below, whether or not they are a technical part of the record in the state court.

(b) The affidavit of A. J. Vinge (Ex. B), the judge of the circuit court who made the order overruling the demurrer for the purpose of showing, and as the *only* method of showing, that these petitioners claimed the federal right at the very inception of their case.

(c) The certified copy of rule IX. as showing how assignments of error and the claims of legal rights are to be presented to the supreme court of Wisconsin.

(d) A copy of rule XVIII. requiring such briefs to be filed with the clerk of that court.

(e) The affidavit of Fred. W. Reed (Ex. C), which simply places in a short form for printing in the record here the exact words in which the federal right was claimed in the said briefs and the exact words of the assignments of error which are set out in the brief filed on the final appeal in the state court.

Respectfully submitted,

W. E. Hale, FRED. W. REED,

Attorney for Petitioners and Plaintiffs in Error.